Ganda Selat Sdn Bhd (in liquidation) v MPDT Capital Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCvC-1459–12 OF 2020
FAIZAH JAMALUDIN J
27 SEPTEMBER 2021

Civil Procedure — Judgments and orders — Setting aside — Whether order of one High Court which was null and void on ground of illegality or lack of jurisdiction could be set aside by another High Court ex debito justitiae — Application of the principles of law pronounced in Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393

The plaintiff was the developer of a condominium ('the project') the construction of which was abandoned when the plaintiff became insolvent. Buyers of units in the project petitioned for the plaintiff's winding up but the petition was stayed when the High Court granted the plaintiff's application to appoint a judicial manager to administer the company. The court subsequently discharged the judicial management order ('JMO') and wound up the plaintiff and appointed a liquidator. During the period the plaintiff was under the judicial manager, and without his knowledge and that of the winding up petitioners, the plaintiff entered into a joint-venture agreement ('JVA') with the defendant under which the latter agreed to take over and complete the project and deliver vacant possession of the completed units to their buyers. After the plaintiff was wound up, the defendant successfully applied to the High Court (vide 'OS 725') for a declaration that the JVA was valid and that the defendant had an interest in the land on which the project was situated. The defendant was also granted an order of specific performance against the plaintiff to deliver up the project to the defendant to allow the development to be completed. The plaintiff's liquidator, acting in the name and on behalf of the company, filed the instant application to set aside the orders made pursuant to OS 725 ('the order') on the ground they were made in breach of the Companies Act 2016 ('the CA'), the Housing Development (Control and Licensing) Act 1966 ('the HDA') and the Housing Development (Control and Licensing) Regulations 1989. The liquidator also complained that he was never informed about or served with OS 725 or the order that was made pursuant to it.

Held, setting aside the order made pursuant to OS 725, ordering the defendant to cease construction on the project and to deliver up the project to the plaintiff, declaring the JVA to be null and void and declaring that the defendant had no interest in the land on which the project was situated:

(1) The High Court lacked jurisdiction to hear OS 725 because the defendant had not obtained leave of the Insolvency Court to commence the action against the wound up plaintiff. The leave application also had to be served on the liquidator. The defendant failed to comply with these requirements in breach of s 471 of the CA thus rendering the order made pursuant to OS 725 void (see paras 42–45 & 85).

(2) As the plaintiff had been wound up, pursuant to s 486 and the Twelfth Schedule of the CA only the liquidator had power to bring or defend any legal proceedings in the name and on behalf of the company. The defendant, however, brought OS 725 against the plaintiff without informing or serving the OS on the liquidator (see paras 36 & 38).

(3) The plaintiff and the defendant entered into the JVA in breach of the CA and the HDA thus rendering the order made pursuant to OS 725 null and void on the ground of illegality. The JVA breached the HDA in that: (a) contrary to s 8(1) and (2) of the HDA, the plaintiff did not notify the Controller of Housing about the proposed JVA with the defendant or obtain the Controller's approval to the JVA before entering into it; and (b) vide s 5(1) of the HDA, only a housing developer licensed under the HDA could carry out housing development; hence, the agreement that the defendant would take over and complete the housing development breached s 5(1) as the defendant was not a licensed housing developer (see paras 74, 76–81 & 84).

(4) The JVA was entered into when the plaintiff was under the control of the judicial manager ('JM'). During the period the judicial management order ('JMO') was in force, the directors of the plaintiff were functus officio and had no capacity to enter into the JVA on the company's behalf. Section 405(3) of the CA provided that during the period the JMO was in force, the affairs, business and property of the company shall be managed by the JM appointed by the court. Section 414(2) of the CA provided that all powers conferred, and duties imposed, on the company by the CA or by the constitution of the company shall be exercised and performed by the JM and not by the directors. As the directors of the company had no legal capacity to enter into the JVA during the period of the JMO, the JVA was invalid and in breach of the aforesaid statutory provisions (see paras 49, 51–53 & 56).

(5) Although the plaintiff did not own the land on which the project was situated, its 'property' was its right to develop the land, construct the apartment units and sell them. It was evident from the JVA that the plaintiff had disposed of that 'property' to the defendant as the total management of the project was handed over to the defendant. Such disposition of the company's 'property' pursuant to the JVA and after the

presentation of the winding up petition without leave of the Insolvency Court was a contravention of s 472(1) of the CA and was accordingly void (see paras 65–67).

(6) Under cl 22 of the JVA, the plaintiff was to be paid RM30,000 per month during the duration of the completion of the project. However, the defendant agreed to pay that sum monthly to the directors of the plaintiff instead of to the company. The defendant also agreed to allocate to the directors personally 15% of the profits of the development or eight apartment units based on the price of RM400,000 per unit. The directors of the company were unsecured creditors and the remaining assets of the company had to be distributed pari passu amongst its unsecured creditors. Thus, the arrangement to pay the aforesaid monthly payments and profit-sharing allocation to the directors amounted to an undue preference under s 528 of the CA and contravened the insolvency regime under s 527 of the CA. This was a further reason why the JVA was void (see paras 68–71 & 73).

(7) As the order made pursuant to OS 725 was null and void on the ground of illegality or lack of jurisdiction, this court, although of concurrent jurisdiction, was afforded the basis to set aside the said order *ex debito justitiae* on the principles propounded in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC) (see paras 25 & 86).

[Bahasa Malaysia summary

Plaintif merupakan pemaju sebuah kondominium ('projek tersebut') yang pembinaannya terbengkalai apabila plaintif menjadi tidak solven. Pembeli unit dalam projek tersebut telah membuat petisyen untuk penggulungan plaintif tetapi petisyen tersebut digantung apabila Mahkamah Tinggi membenarkan permohonan plaintif untuk melantik pengurus kehakiman untuk mentadbir syarikat tersebut. Mahkamah kemudiannya melepaskan perintah pengurusan kehakiman ('JMO') dan menggulung plaintif dan melantik pelikuidasi. Sepanjang tempoh plaintif berada di bawah pengurus kehakiman, dan tanpa pengetahuannya dan pempetisyen penggulungan, plaintif telah memeterai perjanjian usaha sama ('JVA') dengan defendan di mana defendan bersetuju untuk mengambil alih dan menyiapkan projek dan menyerahkan milikan kosong unit yang telah siap kepada pembeli mereka. Selepas plaintif digulung, defendan berjaya memohon kepada Mahkamah Tinggi (melalui 'OS 725') untuk mendapatkan deklarasi bahawa JVA adalah sah dan defendan mempunyai kepentingan dalam tanah di mana projek tersebut terletak. Defendan juga telah dibenarkan perintah pelaksanaan spesifik terhadap plaintif untuk menyerahkan projek kepada defendan bagi membolehkan pembangunan disiapkan. Pelikuidasi plaintif, yang bertindak atas nama dan bagi pihak syarikat, memfailkan permohonan semasa untuk mengetepikan perintah yang dibuat menurut OS 725 ('perintah tersebut') atas alasan ia

dibuat melanggar Akta Syarikat 2016 ('AS'), Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('APP') dan Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. Pelikuidasi juga mengadu bahawa beliau tidak pernah dimaklumkan atau diserahkan OS 725 atau perintah yang dibuat menurutnya.

Diputuskan, mengenepikan perintah yang dibuat menurut OS 725, memerintahkan defendan menghentikan pembinaan projek dan menyerahkan projek kepada plaintif, mengisytiharkan JVA sebagai terbatal dan tidak sah dan mengisytiharkan bahawa defendan tidak mempunyai kepentingan dalam tanah tersebut di mana projek tersebut terletak:

(1) Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar OS 725 kerana defendan tidak mendapat kebenaran Mahkamah Insolvensi untuk memulakan tindakan terhadap plaintif yang telah digulung. Permohonan kebenaran juga harus disampaikan kepada pelikuidasi. Defendan gagal mematuhi keperluan ini yang melanggar s 471 AS sehingga menyebabkan perintah yang dibuat menurut OS 725 tidak sah (lihat perenggan 42–45 & 85).

(2) Memandangkan plaintif telah digulung, menurut s 486 dan Jadual ke-12 AS hanya pelikuidasi mempunyai kuasa untuk membawa atau mempertahankan sebarang prosiding undang-undang atas nama dan bagi pihak syarikat. Defendan, bagaimanapun, membawa OS 725 terhadap plaintif tanpa memaklumkan atau menyampaikan OS kepada pelikuidasi (lihat perenggan 36 & 38).

(3) Plaintif dan defendan memasuki JVA dengan melanggar AS dan APP dengan itu menjadikan perintah yang dibuat menurut OS 725 terbatal dan tidak sah atas alasan menyalahi undang-undang. JVA telah melanggar APP kerana: (a) bertentangan dengan s 8(1) dan (2) APP, plaintif tidak memberitahu Pengawal Perumahan tentang JVA yang dicadangkan dengan defendan atau mendapatkan kelulusan Pengawal terhadap JVA sebelum memasukinya; dan (b) mengikut s 5(1) APP, hanya pemaju perumahan yang berlesen di bawah APP boleh menjalankan pembangunan perumahan; maka, perjanjian bahawa defendan akan mengambil alih dan menyelesaikan pembangunan perumahan melanggar s 5(1) kerana defendan bukan pemaju perumahan berlesen (lihat perenggan 74, 76–81 & 84).

(4) JVA telah dimeterai apabila plaintif berada di bawah kawalan pengurus kehakiman ('JM'). Sepanjang tempoh perintah pengurusan kehakiman ('JMO') berkuat kuasa, pengarah plaintif adalah functus officio dan tidak mempunyai kapasiti untuk memasuki JVA bagi pihak syarikat. Seksyen 405(3) AS memperuntukkan bahawa dalam tempoh JMO berkuat kuasa, hal ehwal, perniagaan dan harta syarikat hendaklah diuruskan oleh JM yang dilantik oleh mahkamah. Seksyen 414(2) AS

memperuntukkan bahawa semua kuasa yang diberikan, dan kewajipan yang dikenakan, kepada syarikat oleh AS atau oleh perlembagaan syarikat hendaklah dilaksanakan dan dijalankan oleh JM dan bukan oleh pengarah. Memandangkan pengarah syarikat tidak mempunyai kapasiti undang-undang untuk memasuki JVA semasa tempoh JMO, JVA adalah tidak sah dan melanggar peruntukan berkanun yang tersebut di atas (lihat perenggan 49, 51–53 & 56).

(5) Walaupun plaintif tidak memiliki tanah di mana projek tersebut terletak, 'harta'nya adalah haknya untuk membangunkan tanah tersebut, membina unit pangsapuri dan menjualnya. Terbukti daripada JVA bahawa plaintif telah melupuskan 'harta' tersebut kepada defendan kerana jumlah pengurusan projek telah diserahkan kepada defendan. Pelupusan 'harta' syarikat tersebut menurut JVA dan selepas pembentangan petisyen penggulungan tanpa kebenaran Mahkamah Insolvensi adalah melanggar s 472(1) AS dan adalah tidak sah (lihat perenggan 65–67).

(6) Di bawah klausa 22 JVA, plaintif perlu dibayar RM30,000 sebulan sepanjang tempoh penyiapan projek. Bagaimanapun, defendan bersetuju untuk membayar jumlah tersebut setiap bulan kepada pengarah plaintif dan bukannya kepada syarikat. Defendan juga bersetuju memperuntukkan kepada pengarah secara peribadi 15% daripada keuntungan pembangunan atau lapan unit pangsapuri berdasarkan harga RM400,000 seunit. Pengarah syarikat adalah pemiutang tidak bercagar dan baki aset syarikat perlu diagihkan secara pari passu di kalangan pemiutang tidak bercagarnya. Oleh itu, persetujuan untuk membayar bayaran bulanan dan peruntukan pembahagian keuntungan yang tersebut di atas kepada para pengarah terjumlah keutamaan yang tidak wajar di bawah s 528 AS dan melanggar rejim insolvensi di bawah s 527 AS. Ini adalah sebab lanjut mengapa JVA tidak sah (lihat perenggan 68–71 & 73).

(7) Memandangkan perintah yang dibuat menurut OS 725 adalah batal dan tidak sah atas alasan menyalahi undang-undang atau kekurangan bidang kuasa, mahkamah ini, walaupun mempunyai bidang kuasa serentak, diberi asas untuk mengetepikan perintah *ex debito justitiae* tersebut atas prinsip yang dicadangkan dalam *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (MP) (lihat perenggan 25 & 86).]

Cases referred to

Azabar Holdings Sdn Bhd (in liquidation) v Kumarappan @ Thannirmalai a/l KM Palaniappan & Anor [2021] 3 MLJ 448; [2021] 6 CLJ 240, CA (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909, FC (folld)

A *Dubon Bhd (in liquidation) v Wisma Cosway Management Corp* [2020] 4 MLJ 288; [2020] 6 CLJ 589, FC (refd)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37; [1982] 1 LNS 21, FC (refd)
Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729, CA (refd)
B *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92, FC (refd)
Isaacs v Robertson [1985] AC 97, PC (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners) [1996] 2 MLJ 431; [1996] 4 CLJ 52, HC
C (refd)
Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd [2020] 5 MLJ 614; [2020] 9 CLJ 449, FC (refd)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other
D *appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169; [2013] 3 AMR 297, CA (refd)
Teoh Ah Mooi @ Chow Kui Eng Mooi v Causeway Bay Plantations Sdn Bhd [2014] 1 MLJ 263, CA (refd)

E **Legislation referred to**

Companies Act 1965 (repealed by Companies Act 2016) ss 132(1C), 132C, 223, 226(3), 236(2)(a), (3), 292, 293
Companies Act 2016 ss 2, 215, 223, 405(3), 411(4), 414(2), 471, 471(1), 472, 472(1), (2), 486, 527, 528, Twelfth Schedule, Part 1
F Housing Development (Control and Licensing) Act 1966 ss 5(1), 8, 8(1), (2)
Housing Development (Control and Licensing) Regulations 1989

Muhammad Toriq bin Abd Manaf (Toriq Seth & Partners) for the plaintiff.
G *Mohd Khairul bin Abdullah (Hafiz Zabir & Rezal) for the defendant.*

Faizah Jamaludin J:

INTRODUCTION

H

[1] This is an application by the liquidator of the plaintiff, Ganda Selat Sdn Bhd (in liquidation) to set aside an order made by the Shah Alam High Court in Originating Summons No BA-24NCVC-725–07 of 2020 ('OS 725') on 28 July 2020.

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[2] This court allowed the plaintiff's application and has set aside the order in OS 725.

[3] OS 725 was filed by the defendant against the wound up company (as

defined below) without leave of the Insolvency Court (as defined below) in contravention of s 471(1) of the Companies Act 2016. Without the prior leave of the Insolvency Court, the Shah Alam High Court lacked the jurisdiction to hear the defendant's action against the company in OS 725.

[4] Furthermore, this court found, among others, that the JVA between the defendant and the company, contravened both the Companies Act 2016 and the Housing Development (Control and Licensing) Act 1966. Also, the directors of the company lacked the legal capacity to enter into the JVA, since the company was under a judicial management order at the time the JVA was executed between the defendant and the directors of the company without the knowledge and consent of the judicial manager.

[5] Crucially, there was undue preference in favour of the directors of the company in the JVA. Such undue preference contravenes the most fundamental principle of insolvency law (codified in s 528 of the Companies Act 2016); thus, rendering the JVA fraudulent and void.

[6] These findings and others discussed in this judgment means that the order made by the Shah Alam High Court in OS 725 was defective and was null and void on the grounds of illegality.

[7] The full grounds for this court's decision in setting aside the order in OS 725 are set out in this judgment.

BACKGROUND FACTS

[8] Ganda Selat Sdn Bhd ('the company') is the developer of Sg Chinchin Residensi ('the project'), a 20-storey condominium consisting of 350 units of housing accommodation, where 149 apartment units have been sold.

[9] The project was declared as an abandoned project by the Kementerian Perumahan dan Kerajaan Tempatan ('Ministry of Housing') on 10 November 2017.

[10] The purchasers of the apartment units filed a Winding-Up Petition No WA-28NCC-216–03 of 2019 ('winding up petition') at the Kuala Lumpur High Court ('the Insolvency Court') on 12 March 2019 to wind up the company.

[11] On the company's ex parte application for the appointment of a judicial manager, the Insolvency Court in WA-28JM-3–07 of 2019 made a judicial management order on 21 January 2020 ('JMO') appointing Ong Kong Lai as

a judicial manager of the company ('the JM'). With the granting of the JMO, the winding up petition was stayed.

[12] On 5 March 2020, the JM applied to the Insolvency Court to discharge himself as judicial manager of the company because: (i) the company did not pay the JM's fees; (ii) although the JM had held meetings with the directors of the company on 21 January 2020 and 4 February 2020 but the directors could not give any accounts and documents to the JM to enable him to undertake his duties; and (iii) there was no prospect that the purpose/objective of the JMO would be achieved.

[13] In his affidavit in support, the JM said one of the directors, Encik Ahmad bin Bakar, only gave him a letter from the defendant dated 22 January 2020 that suggested to rehabilitate the company. The JM averred that after considering the letter and its terms, he told Encik Ahmad that the defendant's proposal was not in accordance with the JMO and should be rejected.

[14] The Insolvency Court allowed the JM's application and made the order to discharge the JMO on 19 June 2020 ('JMO discharge order').

[15] On 14 July 2020, the Insolvency Court in the winding up petition delivered the following unless order:

> MAKA ADALAH DIPERINTAHKAN menurut s 469(1) Akta Syarikat 2016 bahawa kecuali (unless) jika pihak Pempetisyen-Pempetisyen dan Responden berjaya mendapatkan penyelesaian luar mahkamah pada atau sebelum 25.8.2020, prayer-prayer perintah penggulungan syarikat sepertimana yang dipohon menurut Petisyen bertarikh 12.3.2019 (Lampiran 2) adalah dibenarkan dan berkuatkuasa pada 14.7.2020. Prayer-prayer tersebut adalah sepertimana yang dinyatakan di bawah:
>
> (a) Ganda Selat Sdn Bhd (No. Syarikat 591350-P) digulungkan oleh Mahkamah yang Mulia ini di bawah peruntukan Seksyen 465(1)(e) and 466(1)(a) Akta Syarikat 2016;
>
> (b) Augustine a/l T.K. James (No. KP: 570902-10-6061) dari Tetuan Zakaria Augustine Kang Consultancy Sdn Bhd dilantik sebagai Pelikuidasi; dan
>
> (c) Kos Pempetisyen dibayar dari aset-aset Ganda Selat Sdn Bhd (No. Syarikat 591350-P).

[16] The company was wound up on 14 July 2020 and Augustine a/l TK James was appointed as the liquidator of the company ('the liquidator').

[17] Although the JM had rejected the defendant's proposal to rehabilitate the company in its letter dated 22 January 2020, unbeknownst to the petitioners and the JM, the company entered into a joint venture agreement on

20 March 2020 ('the JVA') with the defendant, referred to in the JVA as 'the White Knight'. The objective of the JVA can be seen in cl 13 which reads:

> 13. The Developers is entering into this New JVA with the White Knight to allow the White Knight to take over and complete the development on as is where is basis and at the same time complete the Land Owners units and deliver vacant possession of the Sold Units upon terms and conditions contained in the New JVA.

[18] The company and the defendant in cl 20(g) of the JVA agreed to terminate the JM 'as soon as possible as the existence of the Judicial Manager will impede the planned progress of takeover by the White Knight'.

[19] After the company was wound up, on 28 July 2020, the defendant filed OS 725 in the Shah Alam High Court seeking declarations that the JVA is valid and/or not void and that the defendant has an interest on the said land; and specific performance for the company to deliver the project to the defendant and to allow the defendant to proceed with the development of the project.

[20] The Shah Alam High Court granted the defendant's application in OS 725 on 19 August 2020. In OS 725, the defendant is referred to as 'Plaintif' and the company is referred as 'Defendan'.

[21] The order in OS 725 reads as follows:

> 1. Satu perintah dekri pelaksanaan spesifik terhadap Defendan dan/atau wakil/pemegang kepentingan Defendan untuk menyerahkan projek pembangunan atas nama Sungai Chinchin Residensi yang dimajukan di atas hartanah GM1787, Lot 1450 dan GM115, Lot 1295, Mukim Setapak, Daerah Gombak, Negeri Selangor Darul Ehsan kepada Plaintif dan/atau wakil/pemegang kepentingan Plaintif;
> 2. Satu perintah dekri pelaksanaan spesifik terhadap Defendan dan/atau wakil/pemegang kepentingan Defendan untuk membenarkan Plaintif dan/atau wakil pemegang kepentingan Plaintif untuk meneruskan pembangunan pada projek Sungai Chinchin Residensi yang dimajukan di atas hartanah GM 1787, Lot 1450 dan GM 115, Lot 1295, Mukim Setapak, Daerah Gombak, Negeri Selangor Darul Ehsan;
> 3. Satu deklarasi bahawa Perjanjian Usahasama yang dimasuki oleh Plaintif dan Defendan pada 30hb Mac 2020 adalah satu Perjanjian yang sah dan/atau tidak terbatal;
> 4. Satu deklarasi bahawa Plaintif dan/atau wakil pemegang kepentingan Plaintif adalah mempunyai kepentingan pada dan/atau atas hartanah GM1787, Lot 1450 dan GM115, Lot 1295, Mukim Setapak, Daerah Gombak, Negeri Selangor Darul Ehsan;
> 5. Tidak ada sebarang perintah terhadap kos.

[22] Pursuant to the order in OS 725, the Shah Alam High Court granted:

(a) an order of specific performance for the company: (a) to deliver the project to the defendant and/or the defendant; and (b) to allow the defendant to continue with the development of the project; and

(b) a declaration that the JVA is valid and/or not void, and (b) the defendant has interest in the land.

[23] The liquidator, in the name and on behalf of the company, filed this instant application to set aside the order in OS 725 because the order was made in breach of the Companies Act 2016 ('the CA 2016'), Housing Development (Control and Licensing) Act 1966 ('the HDA'), and the Housing Development (Control and Licensing) Regulations 1989 ('the HDA Regulations').

LAW ON SETTING ASIDE JUDGMENTS/ORDERS OF COURT

[24] The order in OS 725 was a final order made by the Shah Alam High Court, which is of concurrent jurisdiction with this court. The general rule is that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction: see the Federal Court's decision in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92.

[25] The only exception to this general rule is that a final order or judgment of a High Court can be set aside by another High Court of concurrent jurisdiction where it can be proved that the final order or judgment of the first High Court is null and void on the ground of illegality or lack of jurisdiction.

[26] The Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909 (FC), ('Badiaddin v Arab Malaysian Finance') held that where an order of court is made in contravention of any written law, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose.

[27] Mohd Azmi FCJ in his judgment in *Badiaddin v Arab Malaysian Finance* cited the dicta of Lord Diplock in the Privy Council case of *Isaacs v Robertson* [1985] AC 97, Abdoolcader J (as he then was) in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37; [1982] 1 LNS 21 and Diplock LJ (as he then was) in the English case of *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case (*Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92) that one High Court cannot set aside a final order regularly obtained from another High

Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly, in this country the statement of Abdoolcader J (as he then was) in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39; [1982] 1 LNS 21 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736 Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

[28] Mohd Azmi FCJ went on to hold that for the superior courts to aside an order of court which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition to render the order of court null and void on the ground of illegality or lack of jurisdiction and the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. His Lordship said:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', *the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction*. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction

should also be exercised judicially in exceptional cases where *the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice*. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

[29] Further, in *Badiaddin v Arab Malaysian Finance*, Gopal Sri Ram JCA held:

But *where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose*. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

...

It is therefore clear, in light of the principles established by high authority, that *a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law*. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case. (Emphasis added.)

ANALYSIS AND FINDINGS OF COURT

[30] In determining the plaintiff's application to set aside the order in OS 725, this court must decide whether the order in OS 725 had contravened the CA 2016 and/or the HDA and/or the HDA Regulations. It must also decide whether the High Court in OS 725 had the jurisdiction to hear OS 725 and make the order.

[31] If the order in OS 725 had contravened any or all these written laws, following *Badiaddin v Arab Malaysian Finance*, the High Court had made the order without jurisdiction. The order is hence, rendered null and void and should be set aside.

[32] In this instant case, the plaintiff was not served with the order in OS 725. The plaintiff only found out about the order in OS 725 when it was informed of the order by the Ministry of Housing in a letter dated 21 October 2020 that the Ministry had received a letter from the defendant informing the Ministry that the defendant's JVA with the company had been completed on 20 March 2020 and the High Court order in OS 75 declaring that the JVA is valid for purposes of the development of the project.

[33] The Court of Appeal in *Teoh Ah Mooi @ Chow Kui Eng Mooi v Causeway Bay Plantations Sdn Bhd* [2014] 1 MLJ 263 (CA) following *Badiaddin* and *Eu Finance Berhad v Lim Yoke Foo* held that where an order of court is a nullity, an application to set aside can be made at any time. In *Teoh Ah Mooi @ Chow Kui Eng Mooi*, a judgment in default was obtained in June 1999 against an undischarged bankrupt. The application to set aside the judgment was made more than 12 years later in January 2012 — the Court of Appeal allowed the application and set aside the judgment in default as being a nullity.

Is the order in OS 725 in breach of the CA 2016?

[34] It is not disputed that OS 725 was filed by the defendant at the Shah Alam High Court on 28 July 2020 after the winding up order was given by the Insolvency Court on 14 July 2020, and that the order in OS 725 was granted after the company had been wound up and the liquidator appointed.

[35] The powers of a liquidator where a company has been wound up is set out in the Twelfth Schedule and s 486 of the CA 2016.

[36] After the company has been wound up by the Insolvency Court, pursuant to s 486 and the Twelfth Schedule of the CA 2016, only the liquidator has the power to bring or defend any legal proceedings in the name and on behalf of the company. Section 486 of the CA 2016 reads as follows:

> 486 Powers of liquidator in winding up by Company
>
> (1) Where a company is being wound up by the Court, the liquidator may —
>
> (a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and
>
> (b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.
>
> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[37] One of the powers of the liquidator specified in Part 1 of the Twelfth Schedule at para (a) is that the liquidator 'bring or defend any action or other legal proceedings in the name and on behalf of the company'.

[38] The defendant, when it filed its application in OS 725, knew the existence of the winding up petition, which can be seen from their letter to the company, where the defendant objected to the company's application of the JM. However, the defendant brought OS 725 against the company without informing or serving the OS on the liquidator.

[39] As held by the Federal Court in *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614; [2020] 9 CLJ 449, once 'a company is wound up by an order of court, the board of directors becomes functus officio. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company'.

[40] Vernon Ong FCJ explained that 'there are two different and distinct fact situations under which leave of the court or sanction of the liquidator is required' in respect of legal proceedings by or against a wound up company, namely:

(a) actions or proceedings *against* a wound up company:
Such actions are governed by s 226(3) of the Companies Act 1965 ('the CA 1965') or s 471(1) of the CA 2016 which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound up company; and

(b) actions or proceedings *by* a wound up company:
Such actions are governed by s 236(2)(a) and 236(3) of the CA 1965 Act or s 486 of the CA 2016 read together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained.

[41] The Federal Court in *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* explained:

> [20] Similarly, if a company is wound up by an order of court, the board of directors becomes *functus officio*. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company. A creditor or contributory cannot commence or continue with any action in the name of the wound up company. Accordingly, if a creditor or contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory must apply to the liquidator for his sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound up company's action is dismissed, the liquidators usually impose conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given.
>
> [21] At the outset, it is important to appreciate that there are two different and distinct fact situations under which leave of the court or sanction of the liquidator is required. The first is in respect of action or proceeding against a wound up company. This situation is governed by s 226(3) of the 1965 Act/s 471(1) of the 2016 Act which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound up company. The

second scenario is where action or proceeding is taken by a wound up company: s 236(2)(a) and 236(3) of the 1965 Act/s 486 of the 2016 Act read together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained. The factual matrix in this appeal falls under the latter scenario.

[42] OS 725 is the defendant's action against the company. Section 471 of the CA 2016 states that no action or proceedings can be proceeded with or commenced against a company that has been wound up pursuant to a winding up order by a court, except with the leave of the Insolvency Court being the court that granted the winding up order.

[43] The application for leave must be served on the liquidator. Section 471 of the CA 2016 states:

(1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.

(2) The application for leave under subsection (1) shall be made in the Court granting the winding up order and shall be served on the liquidator.

(3) The office copy of the order for leave under subsection (1) shall be lodged by the applicant referred to in subsection 470(1) with the Registrar and with the Official Receiver within fourteen days from the making of the order.

[44] In this case, the defendant commenced OS 725 after the winding up order was made by the Insolvency Court against the company, without the leave of the Insolvency Court.

[45] The defendant filed OS 725 in the Shah Alam High Court and did not seek leave of the Insolvency Court prior to filing OS 725, which is in contravention of ss 471(1) and 472(2) of the CA 2016. As no application for leave of court was made prior to the filing of OS 725, it follows that no application for leave was served on the liquidator in breach of s 471(1) of the CA 2016.

[46] Although the same firm of solicitors was acting for the company in the winding up petition and in OS 725, they did not inform the Shah Alam High Court in OS 725 that the Insolvency Court had granted the winding up order on 14 July 2020 prior to the filing of OS 725 on 28 July 2020 and the granting of the order in OS 725 on 19 August 2020.

[47] Both OS 725 and the order of court made in OS 725 were made in breach of s 486 and the Twelfth Schedule of the CA 2016 since the company

A was already wound up when OS 725 was filed, and the defendant failed to obtain the leave of the Insolvency Court prior to the filing of OS 725.

[48] Hence, pursuant to the Federal Court's decision in *Badiaddin v Arab Malaysian Finance*, this court can declare that the order in OS 725 as being void
B and set it aside.

Did the directors of the company have the legal capacity to enter into the JVA? Was the JVA in contravention of the CA 2016?

C **[49]** The JVA was entered between the defendant and the company on 20 March 2020, which was the period when the company was under the administration of the JM appointed by the Insolvency Court pursuant to the JMO.

D **[50]** Learned counsel for the defendant submits that as s 411(4) of the CA 2016 does not permit any resolution to be passed or any order made for the winding up of the company, the JVA is valid since it was entered within the period where the company has yet to be wound up.

E **[51]** With respect to learned counsel for the defendant, during the period the JMO is in force, the directors of the company are functus officio. They do not have the capacity to enter into the JVA on behalf of the company.

F **[52]** Under s 414(2) of the CA 2016, all powers conferred, and duties imposed on the company by the CA 2016 or by the constitution of the company, shall be exercised and performed by the JM and not by the directors.

[53] Section 405(3) of the CA 2016 stipulates during the period in which
G the JMO is in force, 'the affairs, business and property' shall be managed by the JM appointed by the court.

[54] The affidavit evidence shows that the defendant had asked the company not to proceed with the appointment of the JM. The deponent of the
H defendant's affidavit, Nik Zamri Majid, in a letter from the defendant to the company dated 22 January 2020 had stated 'It is of utmost important [sic] that you do not proceed with the Application to Court to appoint Managers in Litigation WA-28JM-3–07/2019 as such appointment will complicate the process of rehabilitation'.

I **[55]** In cl 20(g) of the JVA, the defendant and the company expressly agreed to terminate the appointment of the JM as soon as possible 'as the existence of the JM will impeded the planned progress of takeover of by the White Knight'. The defendant is referred to in the JVA as 'the White Knight'.

[56] Accordingly, as the directors of the company did not have the legal capacity to enter into the JVA during the period of the JMO, the JVA is invalid. Furthermore, the JVA was entered in breach of the express provisions of ss 405(3) and 414(2) of CA 2016.

Is the JVA a disposition within the meaning of s 472(1) of CA 2016?

[57] Section 472(1) of the CA 2016 prohibits the disposition of the property of the company, except for a disposition ordered by court or made by a liquidator or an interim liquidator in exercise of the power conferred on him by the CA 2016 or the order of court. Section 472(1) of the CA 2016 reads:

> 472 Avoidance of dispositions of property or certain attachment etc.
>
> (1) Any disposition of the property of the company, other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company made after the presentation of the winding up petition shall, unless the Court otherwise orders, be void.

[58] The defendant argues that the JVA was not a disposition within the meaning of s 472(1) of the CA 2016. To support its argument, learned counsel for the defendant quoted a passage in Zainun Ali JCA's (as she then was) judgment in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169; [2013] 3 AMR 297 ('Pioneer Haven').

[59] With respect to learned counsel for the defendant, this court is not able to agree with him. Contrary to his submission, the Court of Appeal in *Pioneer Haven* did not decide that all joint venture agreements do not constitute a disposal within the meaning of s 132C of the CA 1965 (currently s 223 of CA 2016). Instead, the Court of Appeal upon examining the provisions of the joint development agreement ('JDA') between Pioneer Haven Sdn Bhd and Bukit Jalil Development, noted that it is 'common ground that Bukit Jalil is and continues to be the legal and beneficial owner of the land. There is no transfer of ownership of the land to Pioneer Haven, whether pursuant to the JDA or otherwise', and concluded that the JDA was for the joint development of the land by Pioneer Haven and a division of the profits therefrom between Pioneer Haven and Bukit Jalil as land owners.

[60] Furthermore, the mischief that s 132(1C) of the CA 1965 (now s 215 of the CA 2016) is trying to avoid is different from the mischief that s 472(1) of the CA 2016 (previously s 223 of the CA 1965) is trying to avoid. Section 132C of the CA 1965 reads:

> 132C Approval of company required for disposal by directors of company's undertaking or property

A (1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for —

(a) the acquisition of an undertaking or property of a substantial value; or

B (b) the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

[61] In *Pioneer Haven*, the Court of Appeal held that 'the mischief which C s 132C was enacted to prohibit, was the parting by the company of any of its substantial assets without approval of the shareholders at general meeting'. Zainun Ali JCA (as she then was) said:

[114] One might ask: what is the mischief which s 132C seeks to avoid? Reading the said section as a whole, it is clear that the mischief which s 132C was enacted to D prohibit, was the parting by the company of any of its substantial assets without approval of the shareholders at general meeting. Section 132C makes it incumbent upon the directors and the company to inform the shareholders of any intention to carry into effect any transaction whereby any substantial assets of the company was to be taken out of the company. This duty is indirectly imposed by requiring E shareholders' approval before such transaction is carried into effect. The whole objective of s 132C is designed to protect the interest of the company itself (in this case, Bukit Jalil) and not the interest of a shareholder, such as Ho Hup.

[62] Whereas the mischief that s 472(1) of the CA 2016 (formerly s 223 of F the CA 1965) was enacted to prohibit, is the disposal of the company's property after the presentation of a winding up petition and to safeguard the assets of an insolvent company for the benefit of its creditors.

[63] The Court of Appeal in *Azabar Holdings Sdn Bhd (in liquidation) v* G *Kumarappan @ Thannirmalai a/l KM Palaniappan & Anor* [2021] 3 MLJ 448; [2021] 6 CLJ 240 at para [30] held that 'the jurisprudence established by case laws under s 223 of the CA 1965 applies to s 472 of the CA 2016'. The Court of Appeal held:

H [33] On the issue of disposition of property after the commencement of winding up proceedings, *it is settled law that the transfer of any property belonging to a company after the commencement of winding up proceedings against it, is void if it does not comply with s 223 of the CA 1965.*

[34] The starting point is the seminal case of *Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; [1988] 1 I LNS 44; [1987] 1 MLRA 672 (SC) ('*Lian Keow*'s case').

[35] In that case, the Supreme Court held that a transfer of land which was registered after the commencement of winding up was void, even though the actual transfer documents had been executed prior to the commencement of winding up ...

[36] In *Chai Yen Chong & Ors v Shencourt Properties Sdn Bhd & Ors* [2012] MLJU 1806; [2012] 1 LNS 591; [2013] 1 MLRA 468 (CA), parcels of land belonging to the company were transferred after winding up proceedings were commenced against the company. The Court of Appeal agreed with the High Court's decision that the transfer was void as being in contravention of s 223 of the CA 1965 ...

[64] 'Property' is defined in s 2 of the CA 2016 as:

> 'property', in relation to a corporation, includes land, money, goods, chose in action, things in action, goodwill and every valuable thing, whether corporal or incorporeal, movable or immovable, and whether situated in Malaysia or elsewhere and also includes obligations, servitudes, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to the property;

[65] In this instant case, the company does not own the land. The company's 'property' is its right to develop the land, construct the apartment units for the project and sell the apartments units, pursuant to the joint venture agreement dated 17 August 2007 the company had entered with the registered owners of the land.

[66] It is evident from the terms of the JVA that the company had disposed of its 'property' to the defendant. Pursuant to the JVA, the company had handed over the total management of the project to the defendant in terms of the construction of the project as well as revenue management including sales of the unsold units of apartments and expressly agreed in cl 15 to 'not to interfere in any aspect of the management' of the development. This is evident from:

(a) cl 10 of the JVA, where it is stated that 'the Developers [the Company] are desirous in having the White Knight [the defendant] take over and complete the whole Project as the Developers are no longer solvent and unable to proceed with Project';

(b) cl 12, where the defendant a special purpose vehicle ('SPV') to undertake the completion of the development;

(c) cl 15, where the company agrees on the completion of the JVA to hand over the total management of the development of the project to the defendant and 'not to interfere in any aspect of the management' of the development;

(d) cl 18, where the company affirms that the defendant is entrusted and authorised 'in every aspect of the development to manage, complete, sell the unsold units, manage the revenue and facilitate the completions of Sold Units, Land Owners Units and the Unsold Units in accordance with the terms and conditions of the JVA ...'; and

(e) cl 19, where the company agrees that the defendant shall have control, operations and management including revenue management of the project and shall carry out and complete all the development;

(f) cl 23, where it was agreed that the defendant 'shall at its own costs and expense, complete the constructions and deliver vacant possession of the Sold United, Registered Land Owners Units and the Unsold Units to their respective purchasers and Registered Land Owners within the time described';

(g) cl 27, where the defendant will commence the construction of the buildings in the Project at its own expense within 60 days from the date of the JVA 'being endorsed by the Court or any other dates suitable for the approval of the authorities'; and

(h) cl 37, where the company authorised the defendant to take delivery of vacant possession of the project site and all constructed buildings from the date of the JVA.

[67] For these reasons, this court finds that the company's disposal of its property to the defendant pursuant to the JVA, amounts to a disposition of the property of the company after the presentation of the winding up petition, without leave of the Insolvency Court, is in contravention of the s 472(1) of the CA 2016 and is accordingly, void.

Is the JVA void as an undue preference to the directors of the company?

[68] Under cl 22 of the JVA, the company is to be paid the sum of RM30,000 per month for its maintenance during the completion of the process of 30 months.

[69] However, instead of the company receiving the RM30,000 per month, it is the directors of the company who will be personally receiving the RM30,000 per month from the defendant.

[70] The directors of the company will also be personally allocated 15% of the profits of the development or eight apartment units based on the price of RM400,000 per unit. This is evident in the letter dated 7 February 2020 (annexed as part of the JVA) from the defendant to the company, which states:

> 3. The Directors of GDSB [the Company] will be allocated 15% of the profits of the development or 8 units based on assumed price of RM400,000.
>
> 4. The Directors will be paid in total RM30,000 per month for the duration of the project completion instead of RM40,000 that you request.

[71] The directors of the company are unsecured creditors, and the remaining assets of the company must be distributed pari passu amongst its unsecured creditors. The agreement between the company and the defendant to pay the sum of RM30,000 per month for the duration of the completion of the project to the directors of the company and the allocation of 15% profit share of the project to the directors of the company, amounts to undue preference in favour of the directors under s 528 of the CA 2016 (formerly s 293 of the CA 1965). The payments and the profit share to the directors of the company contravenes the statutory insolvency regime under s 527 of the CA 2016 (formerly s 292 of the CA 1965).

[72] As held by the Federal Court in *Dubon Bhd (in liquidation) v Wisma Cosway Management Corp* [2020] 4 MLJ 288; [2020] 6 CLJ 589, per Nallini Pathmanthan FCJ:

> [1] In the field of insolvency, the law on the rights of secured and unsecured creditors, as well as that relating to priorities and preference payments, is well-settled in statute, and consequently by case-law, which provides both certainty and judicial precedent.
>
> ...
>
> [35] *Our rationale is borne out by s 292 as well as the importance of the pari passu rule in insolvency in relation to unsecured creditors* ... In *Malaysian Trustees Bhd v. Transmile Group Bhd & Ors* [2012] 3 MLJ 679 the sanctity of the rule in insolvency law was expressed as follows:
>
> > [22] The pari passu rule is the cornerstone of insolvency law. It is one of the most fundamental principles of the law of liquidation and is at the very heart of the whole statutory scheme of winding up. It is considered as the most universal of all insolvency principles. It is an old equitable principle that all persons similarly situated are entitled to equality in treatment in the distribution of the assets of the company in the process of liquidation (see *McPherson's Law of Company Liquidation* at para 13.100 at pp. 13–1051 and *Roy Good Principles of Corporate Insolvency Law* at p 175 para 7.02) ...
>
> [36] In *Transmile* the Court of Appeal went on to explain that s 292(1) provides for the distribution of assets in winding up. The liquidator is obliged firstly to apply the available unencumbered assets to settle the preferential debts as statutorily provided for and secondly to pay the unsecured debts of the company *pari passu*. As such 'debts of the same class shall rank equally between themselves and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

[73] Therefore, another reason the JVA is void is because of the undue preference given to the directors of the company.

Do the terms of the JVA contravene the HDA?

[74] Section 8 of the HDA states that a licensed housing developer cannot enter into with an arrangement or agreement 'to sell, transfer, assign, dispose of or reconstruct his business or management relating to housing development either by amalgamation or otherwise' without the approval of the Controller of Housing. Section 8(1) and (2) of the HDA states:

> 8 Arrangement or agreement affecting the business of a licensed housing developer
>
> (1) Where a licensed housing developer proposes to enter into an arrangement or agreement to sell, transfer, assign, dispose of or reconstruct his business or management relating to housing development either by amalgamation or otherwise, the licensed housing developer shall as soon as possible notify the Controller of the proposed arrangement or agreement and unless approved by the Controller under subsection (2), the licensed housing developer shall not proceed with that arrangement or agreement.
>
> (2) Where the Controller receiver the notification of the proposed arrangement or agreement under subsection (1), the Controller may approve the arrangement or agreement or refuse to give approval thereto; and in approving the same he may impose thereon such conditions as he may deem fit and proper for the purpose of carrying into effect the provisions of this Act.

[75] The terms of the JVA, particularly in cll 10, 15, 18 and 19, amounts to an agreement between the company and the defendant for the company 'to sell, transfer, assign, dispose of or reconstruct his business or management relating to housing development either by amalgamation or otherwise'.

[76] In breach of s 8 of the HDA, the company did not notify the Controller of the proposed JVA with the defendant. It also did not seek or obtain the approval of the Controller of Housing prior to entering in the JVA with the defendant.

[77] Pursuant to s 5(1) of the HDA, only a housing developer licensed under the HDA can engage in, carry on, undertake or cause to be undertaking housing development:

> (1) No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.

[78] Evident from the JVA, the defendant and the company had agreed that the defendant, among others, will 'take over and complete the construction of the whole development' and 'shall have control, operations and management including revenue management of the project and shall carry out and complete all the development'.

[79] However, the defendant is not a licensed housing developer under the HDA. Therefore, the defendant taking over and completing the construction of the development is in breach of s 5(1) of the HDA. As Anuar Zainal Abidin J (as he then was) held in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners)* [1996] 2 MLJ 431; [1996] 4 CLJ 52:

> It is clear from the above provisions that a housing developer must be in possession of a licence issued under the Act before it engages in carrying on or undertaking the housing development. This is an absolute prohibition.

[80] Accordingly, this court finds that the JVA is in breach of the HDA given that: (i) the company did not notify the Controller of Housing of the proposed JVA with the defendant; (ii) the company did not seek for and obtain the approval of the Controller of Housing prior to entering into the JVA with the defendant; and (iii) the defendant is not a housing developer duly licensed under the HDA.

DECISION

[81] As discussed above, the defendant and the company had entered into the JVA in contravention of written law, namely the CA 2016 and the HDA.

[82] Additionally, the OS 725 was filed by the defendant in the Shah Alam High Court without leave of Insolvency Court, in contravention of s 471(1) of the CA 2016.

[83] Moreover, as the company had been wound up, only the liquidator has the power under Part 1 of the Twelfth Schedule of CA 2016 to defend the defendant's action against the company. In this case the liquidator was neither made a party nor served with the cause papers in OS 75.

[84] The JVA, which the Shah Alam High in OS 725 had declared as valid in its order contravenes the provisions of both the CA 2016 and the HDA; thus rendering the order in OS 725 defective and null and void on the grounds of illegality.

[85] Moreover, the Shah Alam High Court lacked the jurisdiction to hear OS 725 since the defendant did not seek leave of the Insolvency Court prior to commencing the action against the company in breach of s 471(1) of the CA 2016. The order in OS 725 is thus, void.

[86] Therefore, pursuant to the principles in *Badiaddin v Arab Malaysian*

Finance, this court is afforded the basis to set aside the order in OS 725 *ex debito justitae*.

[87] Accordingly, the order in OS in OS 725 is hereby set aside.

[88] The defendant is ordered to cease with the construction of the project and to deliver the project to the plaintiff.

[89] It is hereby declared that the JVA between the defendant and the company is null and void and that the defendant does not have any interests in the land.

Order accordingly.

Reported by Ashok Kumar